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U.S. - Supreme Court, U.S.
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CHARLES ELMORE GROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1048

IN THE MATTER OF

PAUL MOSER, DOING BUSINESS AS MOSER BUSINESS

COLLEGE,

BANKRUPT.

MAURICE KLEIN, TRUSTEE IN BANKRUPTCY,
Petitioner,

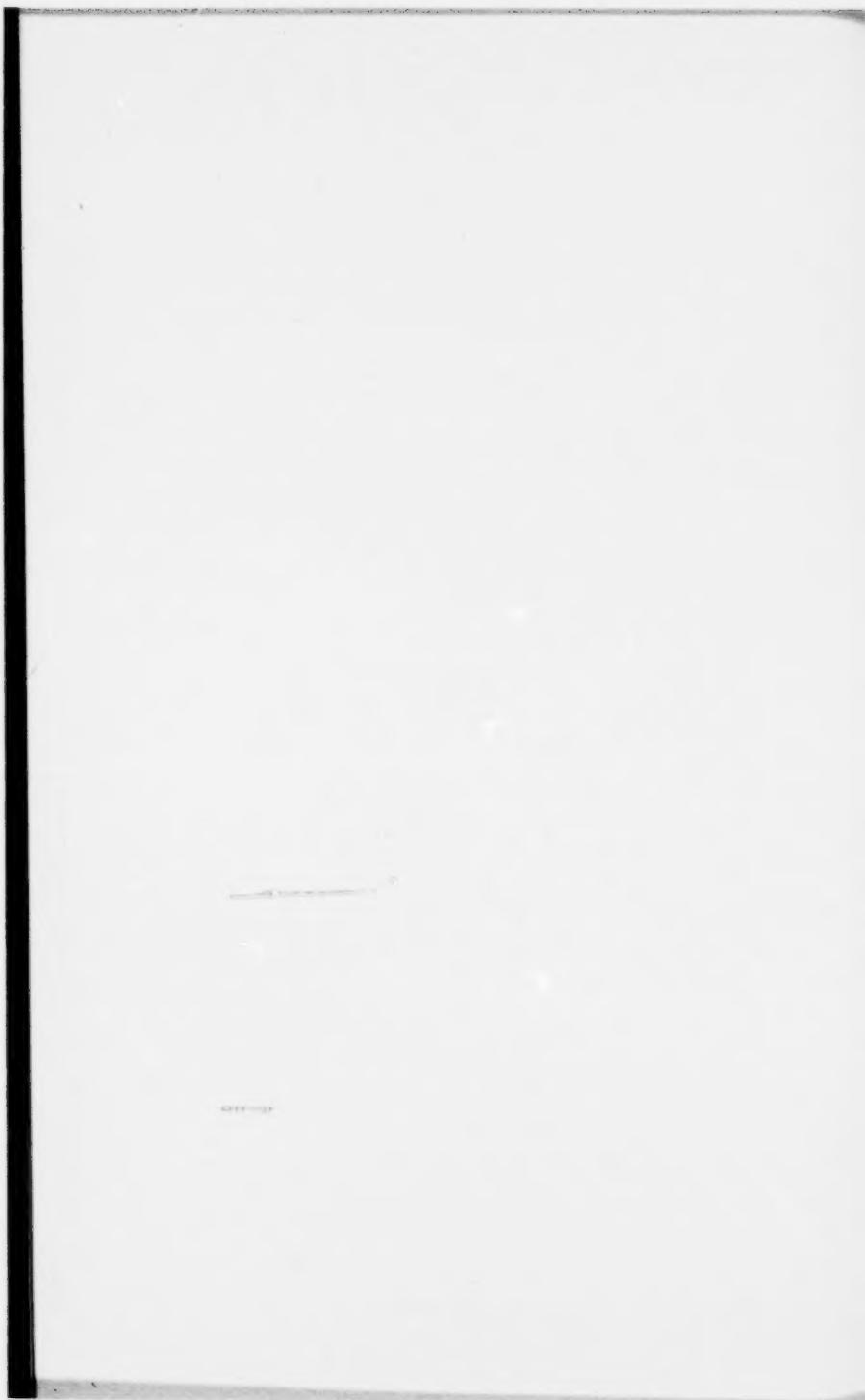
vs.

MARY K. MOSER,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN
SUPPORT THEREOF.**

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vs.

MARY K. MOSER,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT, AND BRIEF IN SUPPORT THEREOF.**

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, Maurice Klein, Trustee in Bankruptcy
of Paul Moser, Bankrupt, respectfully prays that the
Court direct a Writ of Certiorari be issued to review a
decision of the United States Circuit Court of Appeals
for the Seventh Circuit, and in support of said prayer
shows:

Statement of the Matter Involved.

That there is pending in the District Court of the United States, for the Northern District of Illinois, Eastern Division, a bankruptcy proceeding entitled "Paul Moser, doing business as Moser Business College, Bankrupt, No. 43 B 479," and that your petitioner is the duly appointed Trustee in Bankruptcy in said estate.

That the respondent, Mary K. Moser, filed her claim against said estate for unpaid installments under an agreement dated July 23, 1929, between respondent and said bankrupt, which said agreement was made, executed and delivered by the parties at Chicago, in the State of Illinois, and that said parties thereto were citizens of the State of Illinois; that said agreement set up that the said parties were married at Chicago, Illinois, on the 25th day of October, 1919, but had been living separate and apart from each other since on or about May 22, 1928, and that said agreement provided, among other things, the following preamble:

"WHEREAS, the Parties hereto are desirous of adjusting any and all rights of support, dower or inheritance, by reason of said marriage, and the Party of the Second Part is and has been fully advised as to the assets, liabilities and financial condition of the Party of the First Part, and is fully informed as to the amount of his income."

and, among other things, the following:

" * * * and further agrees that she will and does hereby release and discharge the Party of the First Part of and from any and all claim for support, maintenance or alimony, and solicitors' fees, temporary or permanent, by reason of said marriage, and each of the Parties does hereby mutually release to the other, any and all claim of award, dower, homestead, right of inheritance or of any benefit that now exists or which may hereafter exist under and by

virtue of the laws of the State of Illinois, by reason of the marriage of the Parties hereto and pertaining to property now owned or hereafter acquired by the Parties hereto, or either of them, * * *."

That objection to the allowance of respondent's claim was duly filed in said cause by your petitioner, the grounds of said objection being that the contract was against the public policy of the State of Illinois and was, and is, void and unenforceable.

That said claim of said respondent was allowed by the Referee against the estate of said bankrupt in the sum of \$3500.00.

Whereupon, your petitioner filed a petition for review from the order of said allowance and upon the hearing of said petition for review, said petition was, by the Judge of the District Court, for said District and Division, sustained, and the order of allowance of said claim by said Referee was overruled and vacated and that said claim was by said court disallowed and expunged from the records in said cause, on the ground that said contract was, and is, contrary to the public policy of the State of Illinois, and was, and is now, void and unenforceable. That the Circuit Court of Appeals reversed the order of the District Court on appeal from said order and denied the petition for rehearing, on the 20th day of December, 1944.

That subsequent to the making of said agreement, said Paul Moser brought suit for divorce against said respondent, in the Circuit Court of Cook County, Illinois, alleging desertion therein as grounds of said suit; said respondent was duly served with summons by the Sheriff of said County in said cause, and the Circuit Court found, upon hearing, that said respondent was personally served with summons and that respondent had wilfully deserted and absented herself from said complainant, Paul Moser,

without any reasonable cause on his part so to do. The said court decreed that the bonds of matrimony theretofore existing between said parties were dissolved. There was no award of alimony made by said court in said cause.

There are no disputed facts in the case. The various orders entered in said cause were based on the construction of the State law applicable to such contracts.

Reasons Relied on for Allowance of Writ.

1. That the contract upon which said claim is based is an Illinois contract, made, executed and delivered in the State of Illinois by Illinois parties, and that the construction of said contract is governed by the laws of the State of Illinois.
2. That the Supreme and Appellate Court of the State of Illinois have, by a long line of decisions, declared void and unenforceable, as against public policy of the State of Illinois, contracts between husband and wife, wherein, as a part of the consideration in said expressed contracts, the wife releases her husband from the duty of support.
3. That the considerations for contracts, such as is involved herein, are illegal.
4. That the Circuit Court of Appeals by its decision has decided an important question of local Illinois law contrary to the settled law of the State of Illinois.
5. That the opinion and judgment of the Circuit Court of Appeals is based upon an excerpt of the opinion of the Illinois Supreme Court, quoted in said opinion by the said Circuit Court of Appeals, from the case of *Van Koten v. Van Koten*, 323 Ill., at page 326 thereof, wherein the Illinois Supreme Court distinguished contracts between husband and wife as to their mutual property rights from cases such as the one at bar herein, wherein one of the

material provisions of the contract is that the husband shall be relieved of the obligation to support the wife. The Circuit Court of Appeals overlooked what immediately follows the quotation, by it cited, in *Van Koten v. Van Koten*, wherein the Illinois Supreme Court has said, on the lower part of page 326:

"Marriage is a civil contract to which there are three parties,—the husband, the wife and the State,—and it is regarded as a status based upon public necessity and controlled by law for the benefit of society at large. * * * One of the contractual obligations of the marriage contract is the duty of the husband to support the wife, and this contractual obligation cannot be abrogated without the consent of the third party,—the State. Husband and wife may contract with each other as to their mutual property rights, but the husband cannot by contract, either before or after marriage, relieve himself of the obligation imposed upon him by law to support his wife, and a contract between husband and wife one of the material provisions of which is that the husband shall be relieved of the obligation imposed upon him by law to support his wife is illegal and void as being contrary to public policy."

Prayer.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued under the seal of the Court, directed to the United States Circuit Court of Appeals, for the Seventh Judicial Circuit, commanding that said Court certify and transmit to this Court, on a day to be designated, a full and complete transcript of the record and proceeding of said Circuit Court of Appeals in said case, entitled on its docket "In the matter of Paul Moser, doing business as Moser Business College, Bankrupt—Mary K. Moser, Appellant, vs. Maurice Klein, Trustee in

Bankruptcy of Paul Moser, doing business as Moser Business College, No. 8514", to the end that this cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States of America, and that said final order of said Circuit Court of Appeals be reversed or altered by this Honorable Court; and this petitioner also prays for such other, further and affirmative relief as may seem proper.

MAURICE KLEIN,
*Trustee in Bankruptcy of Paul
Moser, doing business as Moser
Business College, Petitioner.*

LOUIS COHEN,
DAVID JETZINGER,
Counsel for Petitioner.





**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI.**

The foregoing petition contains a statement of the case, the issues, the rulings of the lower courts, and the reasons for granting a Writ of Certiorari.

Opinion Below.

The decision on which review is sought was rendered on October 30, 1944, by the Circuit Court of Appeals. A rehearing was denied and judgment rendered on the 20th day of December, 1944. The opinion of the Circuit Court of Appeals appears in 145 Fed. (2), page 523. (Advance Sheets, Federal Reporter, dated January 15, 1945).

Jurisdiction of the Supreme Court.

Jurisdiction of the Court is invoked pursuant to Sections 237 (b) and 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Rule 38 (B) of the Supreme Court of the United States.

ARGUMENT.

The Circuit Court of Appeals has fairly stated the facts in this case in its opinion. There were no disputed facts in the case. Questions of law alone arise on the record.

I.

The Court Below Overlooked or Ignored That Part of the Opinion in *Van Koten v. Van Koten*, Which Declared Contracts of This Character as Being Against and Opposed to the Public Policy of the State of Illinois, and Therefore Void.

As previously stated in the petition, the Circuit Court of Appeals based its opinion and judgment in the case at bar by citing from the case of *Van Koten v. Van Koten*, 323 Ill. 323, in respect to what the court said in distinguishing a class of cases wherein the husband and wife merely agree to the settlement of their mutual property rights; that the Court of Appeals, obviously, ignored the portion of the opinion in which the Supreme Court of Illinois decided the case by reversing the lower court, on the ground that the contract there involved also embraced a provision wherein the wife released the husband from his duty of support, and on page 326, immediately following the portion of the opinion quoted by the Circuit Court of Appeals, the Illinois Supreme Court said the following:

"Marriage is a civil contract to which there are three parties,—the husband, the wife and the State,—and it is regarded as a status based upon public necessity and controlled by law for the benefit of society at large.

* * * One of the contractual obligations of the marriage contract is the duty of the husband to support

the wife, and this contractual obligation cannot be abrogated without the consent of the third party,—the State. Husband and wife may contract with each other as to their mutual property rights, but the husband cannot by contract, either before or after marriage, relieve himself of the obligation imposed upon him by law to support his wife, and a contract between husband and wife one of the material provisions of which is that the husband shall be relieved of the obligation imposed upon him by law to support his wife is illegal and void as being contrary to public policy."

II.

Contracts Between Husband and Wife Wherein Settlements Are Made With Reference to Their Respective Property Rights, Also Embodying Provisions Releasing the Husband From His Obligation to Support the Wife, Are Held to Be Illegal.

In *Vock v. Vock*, 365 Ill., at page 434, the Illinois Supreme Court said the following:

"The \$5000 paid plaintiff by defendant was not only for a release of her rights in his property, but for the release of his obligation to provide for her support. The invalid provision is inseparable from any other provision of the contract and was so material a consideration that it renders the entire contract invalid, under the long established rule that if any part of the entire consideration for a contract is illegal, the whole contract is void. That which is bad destroys that which is good and both perish together."

III.

The Court Cannot Afford any Relief Where Contract Is Illegal or Against Public Policy.

We beg to call the Court's attention to the rule announced in *Vock v. Vock*, 365 Ill., at top of page 435:

"It is a rule of equity that where a contract is illegal or against public policy, a court of equity will not, at the suit of one of the parties who participates in the illegal or immoral intent, either compel the execution of the agreement or set it aside after it has been executed, because to give relief in such a case would injure and counteract public morals. The application of this rule is not in the interest of any party to the illegal or immoral transaction but is in the interest of the public."

IV.

An Illegal Contract Cannot Be Ratified.

The Illinois Supreme Court, in *Lyons v. Schanbacher*, 316 Ill. 569, said on page 574:

"A contract illegal as against public policy cannot be ratified. * * * This court has held an illegal contract cannot be ratified, nor is there any estoppel against asserting its invalidity."

V.

The Law Will Not Lend Its Support to a Claim Founded Upon Its Violation, and the Defense of Illegality Is Allowed for the Sake of the Law and Not for Any Party.

Coppell v. Hall, 7 Wallace, 74 U. S. 558-559.
Lyons v. Schanbacher, 316 Ill. 569.

VI.

Allowance for Separate Maintenance Can Be Made Only in Case Where Separation Is Without Fault of the Wife.

In *Vock v. Vock*, the Supreme Court of Illinois held, on page 434, as follows:

"However, an allowance of separate maintenance, under the statute, can be made to her only in a case where the separation is without her fault."

To the same effect, *French v. French*, 302 Ill. 161.

The Circuit Court of Appeals in its opinion terms the decree of divorce between the parties a default divorce. The decree of divorce finds that the wife was personally served with summons and it was her duty, if she had any defense, to make it by pleading and proof. There was no appeal from the decree and no attempt thereafter to vacate or amend the terms thereof.

The case of *Adler v. Adler*, 373 Ill. 361, cited by the Circuit Court of Appeals, has no application to the question involved in this proceeding. The case went up on the question of the correctness of the ruling of the lower court in reducing the amount of alimony awarded some years before. In that case, the court at the time of making the award of alimony, approved the contract between the parties and the contract was incorporated in the decree of divorce.

In Illinois, courts retain jurisdiction over alimony awards and can either reduce or increase the award when justified, upon a showing of the change of the economic condition of either of the parties that was unforeseen at the time the award was made.

The Circuit Court of Appeals, by overruling the judgment of the District Court and ordering the allowance of the claim of the respondent, thereby permitted her to share

in the distribution of said estate with Creditors of the bankrupt, and by its ruling, said court has construed the contract in direct opposition to the declared public policy of the State of Illinois, shown by an unbroken line of decisions by its courts.

The record shows that this contract was made, executed and delivered in Illinois by citizens of the State of Illinois, and must be construed in accordance with the laws of the State of Illinois.

Tripp v. Payne, 339 Ill. 178.

Northwestern Mutual Life Ins. Co. v. McCue, 223 U. S. 234.

WHEREFORE, it is earnestly urged that certiorari be granted by this Court, requiring the Circuit Court of Appeals for the Seventh Circuit to certify the record in this cause to this court for review and determination.

Respectfully submitted,

LOUIS COHEN,

DAVID JETZINGER,

Counsel for Petitioner.



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BANKRUPT.

MAURICE KLEIN, TRUSTEE IN BANKRUPTCY,
Petitioner,

v.s.

MARY K. MOSER,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT.

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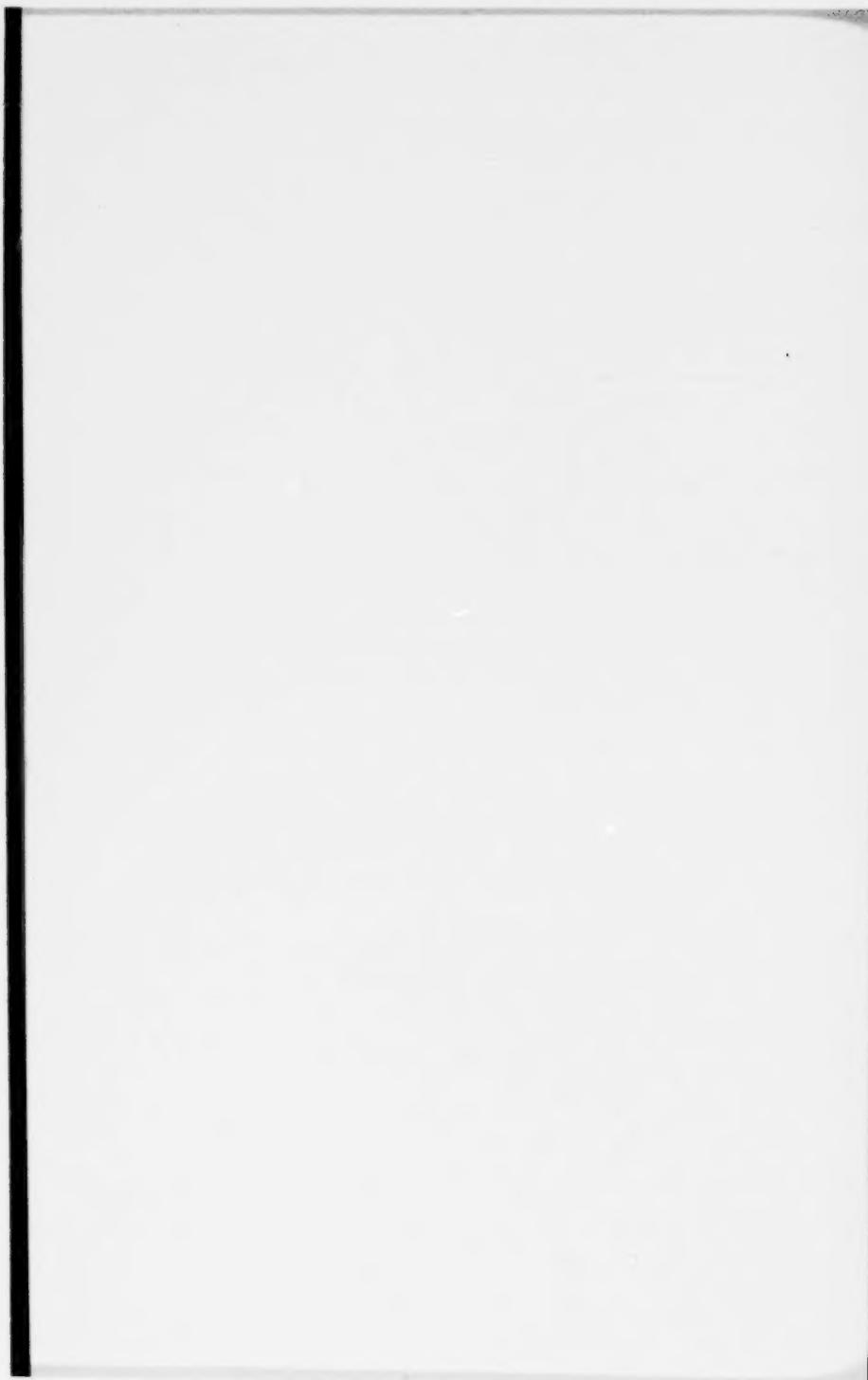
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ARGUMENT.

I. This contract knowingly entered into between husband and wife for the purposes of adjusting their marital rights of support, dower and inheritance, and providing for monthly payments to be made by the husband to the wife during her lifetime regardless of whether they continued to be husband and wife, and while not contemplating a divorce, nevertheless providing for such contingency, is a valid and enforceable contract although the agreement was not incorporated in a subsequent decree of divorce.....	6
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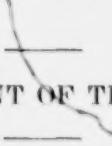
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MARY K. MOSER,

Respondent.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT.**


STATEMENT OF THE CASE.

Petitioner's statement of the matter involved in the Petition for Writ of Certiorari is incomplete.

The respondent, Mary Moser, filed a claim in the bankruptcy proceeding of Paul Moser, her former husband, to recover the unpaid monthly installments under a separation agreement made prior to the divorce, a copy of which

agreement is attached hereto as Appendix A. The Referee allowed the claim for \$3500.00 (R. 10). The Trustee in Bankruptcy filed a petition to review the order of the Referee (R. 11). The Referee prepared a certificate in which he set forth the issues of fact and law involved in the proceeding (R. 13). The District Court sustained the petition to review and disallowed the claim (R. 15). The Circuit Court of Appeals rendered its opinion deciding that the claim should be allowed and reversing the judgment of the District Court (R. 27-31). The opinion appears in 145 Fed. (2nd) 523.

The separation agreement (R. 5, 6), upon which the claim is based, was entered into on the 23rd day of July, 1929, between the bankrupt, Paul Moser, and his wife, the respondent herein, Mary K. Moser, at which time they were living apart. The agreement recites that the parties were married on the 25th day of October, 1919, and have been living separate and apart since May 22, 1928. After reciting that the parties thereto are "desirous of adjusting any and all rights of support, dower or inheritance, by reason of said marriage, and the * * * [wife] is and has been fully advised as to the assets, liabilities and financial condition of the * * * [husband], and is fully informed as to the amount of his income," the agreement provides that the husband shall pay \$400.00 a month to the wife so long as she lives and remains married to him, or in case a divorcee shall be granted to either of them, but in case of her remarriage, the monthly payments may be reduced by the husband to \$300.00. The agreement further provides that in the event of the death of the husband, the payments shall be reduced to \$250.00 a month, and the unpaid installments shall be a charge upon his estate, to be secured by a sum in trust which his executors are directed to set aside unless the husband shall have made other provision to

secure and provide therefor by will or otherwise. In the agreement the wife agrees that she has made a full and complete investigation of the husband's financial affairs and actually knows the true condition thereof and that the provisions are fair and advantageous, and that she does thereby release and discharge the husband from any and all claim for support, maintenance or alimony, and solicitors' fees; and that each party mutually releases the other from any claim of award, dower, homestead, right of inheritance or any other benefit then or thereafter existing under the Illinois laws by reason of their marriage and pertaining to property then or thereafter acquired by the parties or either of them, it being the intention of the parties that the covenants of the agreement shall constitute a complete release and discharge of any claims arising during the lifetime of the parties or of any claim of either against, or any right of either to administer, the estate of the other. The agreement further provides that in case any decree is entered for divorce or separate maintenance in any suit between the parties, the provisions thereof should be incorporated in the decree and made a part thereof regardless of whether a divorce was granted by such decree, if any, to husband or wife.

After the execution of the agreement in July, 1929, the husband continued to make the monthly payments provided in the contract both before and after the divorce decree, and did so until *April 3, 1943*, although such payments were sometimes not at the full rate fixed in the contract (R. 14). In November, 1930, the husband obtained a divorce from the respondent upon the charge of desertion (R. 14). The provisions of the separation agreement are not incorporated in the decree, nor is any provision made for the support of the wife (R. 14). In January, 1943, the husband filed his voluntary petition in bankruptcy and the

respondent herein filed her claim in the proceeding. The parties stipulated that the amount, if any, due her is \$3500.00 (R. 13, 28).

There Is No Basis for the Issuance of a Writ of Certiorari.

Petitioner in his brief (pp. 4, 7) relies upon Rule 38, Paragraph 5 (b) of this Court as a formal basis for the issuance of a Writ, in that the Circuit Court of Appeals has decided an important question of local Illinois law contrary to the settled law of the State of Illinois. But petitioner has not shown that the rule is applicable to the facts and decision of the Court of Appeals in this case.

In the opinion (p. 525) of the Circuit Court of Appeals, the Court quoted the following from the opinion of the Illinois Supreme Court in *Van Koten v. Van Koten*, 323 Ill. 323, cited by petitioner:

"The law in this State is well settled that a husband and wife may by a written post-nuptial contract, based upon a valuable consideration, release to each other his or her rights in the other's property and estate, and thereby extinguish all rights, including the inchoate right of dower. * * * Agreements between husband and wife for a separation are not *per se* illegal or invalid, but where a husband and wife are living separate and apart, or where the circumstances are such that they can no longer congenially live together with the mutual confidence and implicit faith in each other which the sanctity of the marriage relation demands, or where the relations between them are such as to render the separation necessary for the health or happiness of one or the other of them, an agreement between them, fairly and understandingly entered into, adjusting and settling their mutual rights in each other's property, may be lawfully made, * * * and a provision in such contract under such circumstances that the husband will pay to the wife a certain sum

each month for her support is not void as against public policy. * * *

The Circuit Court of Appeals then said (p. 525):

"We are of the opinion that nothing in the contract before us contravenes these principles, and we find nothing in the authorities relied upon by appellee compelling us to hold it contrary to public policy. It was entered into for the purpose of adjusting all marital rights and obligations. It provided adequate support for the wife in the light of her husband's financial circumstances which were fully investigated and understood by her. Although the contract in terms releases and discharges the husband from all claims for support and other marital obligations, such provision must be interpreted in the light of the circumstances shown by other provisions thereof, and so construing it, we fully agree with the referee who stated that this contract was not to avoid the legal liability to support, but to recognize it and make provisions for meeting that obligation."

From the foregoing it is apparent that the decision of the Circuit Court of Appeals is based upon, and is in conformity with, the settled Illinois law.

The Question in This Case.

The sole question in this case is whether the separation agreement entered into between the parties on July 23, 1929, is a legal and enforceable contract or an illegal and unenforceable one as being contrary to the public policy of the State of Illinois.

ARGUMENT.

I.

This Contract Knowingly Entered Into Between Husband and Wife for the Purposes of Adjusting Their Marital Rights of Support, Dower and Inheritance, and Providing for Monthly Payments to Be Made by the Husband to the Wife During Her Lifetime Regardless of Whether They Continued to Be Husband and Wife, and While Not Contemplating a Divorce, Nevertheless Providing for such Contingency, Is a Valid and Enforceable Contract Although the Agreement Was Not Incorporated in a Subsequent Decree of Divorce.

Petitioner's assertion that the contract is void because the husband is relieved of his duty to support the wife, ignores the language of the agreement and the purpose of such agreement, which was to provide for the support of the wife. As the Illinois Supreme Court has repeatedly held, a husband cannot by contract relieve himself of the duty imposed by law to support the wife, but where the parties, in recognition of the husband's duty, enter into a contract defining the extent of such support (there being no question of fraud or unfairness), such contract is for all purposes a legal and enforceable contract whether the same be embodied in subsequent divorce decree or not.

In *Adler v. Adler*, 373 Ill. 361, the Court held that where the parties to a divorce action entered into an agreement providing for the wife's support, and the agreement was adopted in a decree in that action, it was subject thereafter to modification by the Court. As to the capacity of husband

and wife to make a valid contract providing for the wife's support, the Court said (p. 369):

"Husband and wife, parties to a divorce action, may, as an act entirely separate and apart from such action, contract in respect to her future support."

In *Hallam v. Hallam*, 298 Ill. App. 445, a post-nuptial contract provided that in consideration of the creation of an annuity in favor of the wife, payable at the rate of \$200.00 per month, by depositing with an insurance company the sum of \$1,439.00, together with the conveyance of other personal property to the wife, the wife released "all her right to any widow's award, or other claim against Hallam, or his estate, in case of his death, including any claim for alimony, maintenance or support, past, present or future, except as provided by the annuity." The Appellate Court upheld the contract, saying at page 452:

"In our opinion, Hallam did not seek to avoid his obligation, but, on the contrary, met it by creating this annuity as agreed."

In *French v. French*, 302 Ill. 152, the Court considered the validity of a separation agreement alleged to have been entered into between a husband and wife, whereby the husband agreed to pay to his wife as long as they should live separate and apart One Hundred Seventy-five Dollars (\$175.00) per month for the maintenance and support of herself and her son. In holding that such an agreement was not void as against public policy, the Court said at page 161:

"We do not think the agreement entered into between the parties for separate maintenance comes within the rule that makes such agreements void as against public policy, or that the same bars recovery in this case by complainant. It was made at a time, according to the charges in her bill, when she had a right to live separate and apart from him and at a time when she was entitled to separate maintenance, and when he

refused to longer carry out the contract she had a legal right to bring and maintain this suit for separate maintenance."

In the following cases the wife released her right to support during her lifetime, either in consideration of release by the husband of all rights in the wife's property if he survived her, or in consideration of the payment by the husband of a lump sum; and such contracts were held invalid:

Lyons v. Schanbacher, 316 Ill. 569, 573 (release by husband);

Van Koten v. Van Koten, 323 Ill. 323, 327 (lump sum payment);

Vock v. Vock, 365 Ill. 432, 434 (lump sum payment).

The distinction which petitioner overlooks is that in one class of cases the duty to support the wife was recognized by an agreement which provides for performance of the duty during her lifetime. In another class of cases such as the three last cited, no provision was made for performance of the obligation to support her during her lifetime; and the payment in a lump sum subjects the wife to the possibility of being without support if the lump sum settlement should be lost, stolen or used by her immediately for her care, support, or otherwise.

In the case now before the Court, the parties at the time of making the contract recognized the husband's duty and contracted for its fulfillment during the lifetime of the wife, and the husband for over 14 years continued to recognize that duty and the contract's provisions defining it.

It is respectfully submitted that the Circuit Court of Appeals was correct in deciding that a contract for the payment of a reasonable monthly sum of money by the husband to the wife during her lifetime is a valid and enforceable contract.

II.

The Fact That a Default Decree for Divorce Was Secured by the Husband on the Ground of Desertion Does Not Abrogate the Pre-existing Separation Agreement.

At page 11 of his brief, the petitioner asserts that an allowance for separate maintenance can be made only where the separation is without the fault of the wife. It appears from the opinion in *Van Koten v. Van Koten*, 323 Ill. 323, quoted hereinabove (p. 4) that agreements settling their mutual rights in each other's property may be lawfully made by husband and wife when they "are living separate and apart." It appears from the contract here (Appendix A) that on July 23, 1929, when the parties made the contract, they were living separate and apart.

Both *Vock v. Vock*, 365 Ill. 432, and *French v. French*, 302 Ill. 152, 161, cited by petitioner (p. 11), were suits for an allowance of separate maintenance under the statute, which obviously was not the case here.

The husband obtained a *divorce* from the respondent in November, 1930, and the decree made no provision for alimony and did not incorporate the pre-existing separation agreement. Under these circumstances the separation agreement providing for the continued support of the wife was not abrogated by the divorce decree. The bankrupt, Paul Moser, recognized such fact and continued his payments for over 13 years after the decree of divorce and until shortly before the filing of the voluntary petition in bankruptcy.

In *Adler v. Adler*, 373 Ill. 361, the Illinois Supreme Court said at page 369:

"The Divorce statute of this State has been construed to allow alimony to an erring wife, where all the facts and circumstances warrant the Court in so

doing; the objective, in the exercise of such right, is to prevent the imposition of an unjustifiable hardship in a given case that would ensue if the general rule was applied. (Ill. Rev. Stat. 1939, chap. 40, par. 19; *Deenis v. Deenis*, 65 Ill. 167; *Spitler v. Spitler, supra*.) Husband and wife, parties to a divorce action, may, as an act entirely separate and apart from such action, contract in respect to her future support."

Lyman v. Lyman, 268 Ill. App. 274, involved a separation agreement which was not incorporated in a subsequent decree for divorcee. The agreement included a provision that the husband should pay the sum of \$150 per month to the wife for her support, and that in the event the wife obtained a divorcee and remarried, all payments should cease. The Court said in the opinion at pages 276 and 277:

"We do not consider, however, that the decree affects the rights of the plaintiff. It was a default decree and contains no provision for alimony, nor does it subject the defendant to the payment of any moneys to the wife. The separation agreement itself was valid and not contrary to public policy. It was entered into according to its terms after the parties had separated and were living apart. It contained a provision under which the husband was obligated to support the wife and the courts have recognized the right of a husband and wife to enter into an agreement to live separate and apart, provided provision is made for the wife's support in the agreement. *Galusha v. Galusha*, 116 N. Y. 635; *Hirschthal v. Hirschthal*, 134 N. Y. Misc. 479; *French v. French*, 302 Ill. 152; *Patterson v. Patterson*, 111 Ill. App. 342; *Van Koten v. Van Koten*, 323 Ill. 323.

The agreement contemplated that either party might thereafter obtain a divorcee, if just cause arose, but this did not vitiate the agreement, nor would the obtaining of a decree by the wife amount to a waiver of her right to support under the agreement. The parties themselves by their agreement contemplated such a possibility, and provided that in the event the wife

should thereafter remarry, then, and then only, the payments should cease. The obtaining of the divorce did not terminate the agreement, inasmuch as no provision was made in the decree for support. If a provision for alimony had been made, it may be that the separation agreement would have become merged in the decree. *Galusha v. Galusha*, 116 N. Y. 635; *Hirschthal v. Hirschthal*, 134 N. Y. Misc. 479; *Patterson v. Patterson*, 111 Ill. App. 342.

We see nothing in the agreement contrary to the policy of this State nor the State of New York, where the contract was entered into."

In the instant case, in the opinion of the Circuit Court of Appeals (R. 29), the Court, after quoting a portion of the opinion in *Adler v. Adler*, 373 Ill. 361, said:

"Hence it seems that there is no fixed rule denying support even to an erring wife, and the fact that the default decree of divorce in this case did not incorporate the provisions of the contract, as provided by its own terms, is no reason for declaring the contract unenforceable."

Conclusion.

The Circuit Court of Appeals properly reversed the judgment of the District Court and properly decided that the claim of respondent should be allowed in order to permit her to share in the distribution of the bankrupt's estate with other creditors.

Petitioner respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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EARL B. WILKINSON,

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Chicago, Illinois,

Attorneys for Respondent.



APPENDIX A.
—

This Agreement made this 23rd day of July, A. D. 1929, by and between Paul Moser, Party of the First Part, and Mary K. Moser, Party of the Second Part, both of the City of Chicago, State of Illinois.

Witnesseth:

Whereas, the Parties hereto were united in marriage at Chicago, Illinois, on the 25th day of October, A. D. 1919, but have been living separate and apart from each other since on or about May 22, 1928, and,

Whereas, the Parties hereto are desirous of adjusting any and all rights of support, dower or inheritance, by reason of said marriage, and the Party of the Second Part is and has been fully advised as to the assets, liabilities and financial condition of the Party of the First Part, and is fully informed as to the amount of his income.

Now, Therefore, in consideration of the premises and the covenants of the Parties herein contained, the Parties hereto agree as follows:

1. Party of the First Part agrees to pay to the Party of the Second Part, the sum of Four Hundred Dollars (\$400) per month, commencing at the date of this agreement, and so long as she shall live and remain married to the Party of the First Part, or in case a divorce shall be granted to either of the Parties hereto at any time hereafter, then so long thereafter as she shall continue to be unmarried, provided, however, that should the Party of the First Part remarry at any time after such divorce, if any shall hereafter be granted, then said monthly payments may be reduced by the Party of the First Part to Three Hundred Dollars (\$300.00) per month.

2. The Party of the Second Part hereby agrees that she has made a full and complete investigation of the financial condition of Party of the First Part and actually knows the true condition of his affairs, and that this post-nuptial settlement is fair and advantageous and acceptable, and further agrees that she will and does hereby release and discharge the Party of the First Part of and from any and all claim for support, maintenance or alimony, and solicitors' fees, temporary or permanent, by reason of said marriage, and each of the Parties does hereby mutually release to the other, any and all claim of award, dower, homestead right of inheritance or of any benefit that now exists or which may hereafter exist under and by virtue of the laws of the State of Illinois, by reason of the marriage of the Parties hereto and pertaining to property now owned or hereafter acquired by the Parties hereto, or either of them, it being the intention of the Parties hereto that the covenants herein contained shall constitute a complete release and discharge of any claim of any nature whatever, during the lifetime of the Parties hereto or of any right to administer the estate of the other, or of any claim against the estate of the other, either in property, real and personal, now owned by them or either of them or to be hereafter acquired by them or either of them.

3. In case of the death of the Party of the First Part before the payments herein specified shall have been made, the payments shall be Two Hundred Fifty Dollars (\$250) per month instead of Four Hundred Dollars (\$400) per month, and the unpaid installments due hereunder shall be and constitute a charge upon his estate and said payments shall be made by his executors and administrators, who are hereby directed to set aside a sum in trust, sufficient to secure payment of the monthly sums herein provided for, unless the Party of the First Part shall have

made other provision to secure and provide for such payments, by Will or otherwise.

4. It is further agreed that in case any Decree is entered by any Court, in any suit between the Parties hereto, for divorce or separate maintenance, either before or after the payment of all the installments herein specified, then the provisions of this agreement shall be incorporated in said Decree and given the same effect as herein specified. The Parties hereto agree that these provisions shall be made a part of any Decree so rendered, regardless of whether a divorce is granted by such Decree, if any, to the Party of the First Part or to the Party of the Second Part.

In Witness Whereof, the Parties have hereto set their hands and seals at Chicago, Illinois, the day and date first above mentioned.

s/d Mary K. Moser, (Seal)
s/d Paul Moser (Seal)